Petition

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81-1039

NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

WILEY N. JACKSON COMPANY
AND
FIDELITY AND CASUALTY COMPANY
OF NEW YORK

Petitioners,

vs.

DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS
U.S. DEPARTMENT OF LABOR &
BENNY R. GILLIAM,

Respondents.

Petition for Writ of Certiorari
to the United States Court of
Appeals for the Eleventh Circuit

Brief Of Petitioners

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QUESTION PRESENTED

Whether the work of a bridge construction site foreman, employed in bridge construction, off-loading pilings at a construction site, sent thereto by a pilings materialman, has such a realistically significant relationship to maritime commerce as to have "status" for coverage under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, the parties to the proceeding below and those at interest therewith in the matter are as follows:

1. Benny R. Gilliam, Claimant-Respondent.

2. Almer W. Beale, II, Counsel for Claimant-Respondent.

3. Wiley N. Jackson Company, Employer-Petitioner.

4. Continental Insurance Company, as parent of Fidelity and Casualty Company of New York, Carrier-Petitioner.

5. Director, Office of Workers' Compensation Programs, a Respondent below.

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U.S. DEPARTMENT OF LABOR &
BENNY R. GILLIAM,

Respondents.

Petition for Writ of Certiorari
to the United States Court of
Appeals for the Eleventh Circuit

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion rendered by the United States Court of Appeals for the Eleventh Circuit, in the captioned matter on October 15, 1981.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit in the captioned matter is reported at --F.2d ---,(1981), and is reprinted as Appendix A hereto, *infra*, p. A-1.

The opinion of the Benefits Review Board (United States Department of Labor) is reported at 12 BRBS 556 and is reprinted as Appendix B hereto, infra, p. B-1 and the opinion of the Administrative Law Judge is reprinted as Appendix C, infra, p. C-1.

JURISDICTION

The opinion of the Court of Appeals for the Eleventh Circuit was rendered on October 15, 1981. The jurisdiction of this Court is invoked under 28 USCA §1254(1).

STATUTE INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, are as follows:

> 33 U.S.C. §902(3):
>
> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker,

and

33 U.S.C. §902(4):

The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

STATEMENT OF THE CASE

This case squarely presents the issue of the status requirement for Longshoreman's Act jurisdiction upon the water while constructing a bridge and doing a solitary instance of unloading a barge.

Wiley N. Jackson Company ("Jackson") is a highway and bridge construction company. Benny R. Gilliam was employed by that company for approximately 21 years. He was a foreman for 10 years. On this particular project he was construction site foreman.

Jackson was building a bridge, as part of the Florida highway system, across the Amelia River near Florida's Atlantic coast line. It had no employees in a maritime employment. Jackson had ordered pre-cast concrete pilings. The supplier chose the method of delivery. The supplier chose to send them by barge. Before the arrival of this shipment the river's edge had been firmed up for use as a footing for a crane and, in connection with this shipment, was used for off-loading the pilings. It was temporary. The crane was used for bridge building as well as unloading the pilings. During the course of unloading Gilliam saw, or had an epileptic "aura" and thought he saw, the cables of the crane about to strike

him. He jumped out of the way and struck the floor of the barge. Compensation and medical care were furnished under the Florida Workmens Compensation Act. He seeks benefits under the LHCA.

Prior to this time Jackson had never had a claim against it under the LHCA. Coverage was added to its policy of insurance in 1973 simply because the insurance agent did not know to what the Act applied. No premium was charged.

There is then, a solitary instance where a concrete pilings manufacturer, by its own choice, delivered concrete pilings by barge. The bridge construction workers had to offload those pilings. Stevedores do not handle pilings or other items at a construction site. This single instance of activity or physical exertion, similar to that of a longshoreman, should not bring this employer and employee under the provisions of the LHCA.

The Administrative Law Judge found that Gilliam "was not engaged in longshoring ***" or harbor working and was..."not engaged in maritime employment"...(C-5) The Administrative Law Judge also specifically found that the "construction of a dock at the job site"...(was) "constructed for facilitating the bridge building operation, was likely temporary in nature, and was not designed or intended for maritime commerce or navigation." (C-6)

The Board, in its review, rejected Gilliam's suggestion that the injury occurring upon the water was sufficient for coverage, (B-4) and concluded that he was engaged in "bridge construction" and "unloading the barge was merely incidental to the bridge building project, rather than to maritime commerce". (B-4) The Board denied his claim and held that his work "lacks a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters" (B-5) There was one dissent.

REASONS FOR GRANTING THE WRIT

1.

The decision below conflicts with the holding of the Court in *Northeast Marine Terminal Co. vs. Caputo*, 432 U.S. 249 (1977) as the Eleventh Circuit said the claimant can meet the status test by showing "he was engaged in maritime employment at the time of his injury" (A-10) whereas the Court had previously held it was "the obvious desire (of Congress) to cover longshoremen whether or not their particular task at the moment of injury is clearly a 'longshoring operation'. The theory does not comport with the Act's focus on occupations and its desire for uniformity." 434 U.S. at 276.

2.

The decision below conflicts with the Court's decision in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977) in that it does not involve the trade off of ship owners, stevedores, and workers mentioned in 432 U.S. at 261; Gilliam is not one within the "affirmatively (described) class of workers Congress desired to compensate." 432 U.S. at 264; he is not in one of those "occupations - longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker" to which it was desired "to provide continuous coverage throughout their employment". 432 U.S. at 273.

3.

The decision below conflicts with the Court's holding in *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 82 (1979) wherein the Court said:

> We believe that §2(3)'s explicit use of the terms "longshoreman" and "other person engaged in longshoring operations" to describe persons engaged in maritime employment demonstrates that workers doing tasks traditionally performed by longshoremen are within the purview of the 1972 Act.

Yet below Gilliam was a land-construction worker and the record contains affirmative testimony that longshoremen do not unload pilings at construction sites.

4.

There is a conflict with the Ninth Circuit case of *Weyerhaeuser v. Gilmore*, 528 F.2d 957 (9 Cir. 1975) cert. denied. 429 U.S. 868 (1976). The event with which we are concerned in this case occurred on a barge upon a navigable waterway. *Gilmore* directly held that those persons intended to be covered were "*persons customarily considered to be working in the business*". (Emphasis by the Court) 528 F.2d at 960. Further:

> The occupational hazards intended to be guarded against are the traditional hazards to the ship's service employee arising in the course of his employment; i.e., the perils of the sea ***. Accordingly we believe that to be entitled to the benefits of LHCA, an employee's employment must have a realistic relationship to the

> traditional work and duties of a ship's service employment. Otherwise the clear and unambiguous congressional language of "maritime employment" is nullified and rendered to read "any employment."

528 F.2d at 961.

5.

There is a direct conflict between the decision below and that of the Second Circuit in *Fusco v. Perini North River Associates*, 622 F.2d 1111 (2 Cir. 1980) cert. denied. 101 S.Ct. 959 (1981). The Second Circuit held, in the Sullivan case, that handling construction materials was "not performing operations which longshoremen perform." 622 F.2d at 1113. The testimony in the instant case, by a stevedore agent, is that stevedores and longshoremen do not do the sort of unloading which Gilliam was doing.

6.

The decision below conflicts with the Second Circuit case of *Churchill v. Perini North River Associates*, 652 F.2d 255 (2 Cir. 1981). Like *Fusco*, this case arose out of a sewer construction project in the North River. Churchill was unloading caisson from a barge upon which he was standing when injured. The Second Circuit, following the rule of *Ford, supra*, denied coverage explicitly holding injuries upon the water are not, *ipse dixit*, covered.

7.

This cause involves a substantial question of statutory construction in the administration of the Longshore Act. Despite the clear intent of the Congress to cover those "persons customarily considered to be in the business" [118 Cong. Rec. 36385, Part 27 (1972)] there is rampant confusion and uncertainty with respect to those persons who were, 1) injured while in an area "upon the navigable waters" covered under the pre-amended Act and 2) doing physical activity similar to that which "maritime employment" workers do, *a fortiorari*, where, as here, such activity can be considered only "episodic" or merely "singular", in occurrence.

8.

The importance of this question cannot be underscored too severely. The Court, in *Caputo* and *Ford*, has addressed "status" in terms of traditional maritime work. The question of the "miscellaneous" workers who were covered under the pre-amended Act simply because they were injured upon the navigable water has not been addressed.

It is perhaps reasonable to categorically state that in every case before the Benefits Review Board where this matter has been broached, as in the case below, it has been the opinion of one member of the Board that all injuries covered by the pre-amendment Act are covered in the amended Act. That has been the consistent position of the Department of Labor. Yet the majority of the Board, as in this case, has consistently ruled that bridge construction is not covered by the Act. See *Nold v. Guy F. Adkinson Co.*, 9 BRBS 620 (1979). It has held

that "it is clear that injury over navigable waters in and of itself is an insufficient benchmark by which to ascertain maritime employment." *Neely v. Pittston Stevedoring Corp.*, 12 BRBS 859, 860 (1980) and cases cited therein. *LeMelle v. B.F. Diamond Const. Co.*, 13 BRBS 542 (1931).

With a dissent in each such case, appellate review is needlessly encouraged and undertaken.

9.

The decision below creates rampant confusion. In addition to Gilliam, would the crane operator and the person who took the sling from the pilings also be covered? Would that be a "point of rest" or would the next person who removed the piling from the first "point of rest" to a work barge be covered because to hold otherwise "coverage would depend upon the assignment policies of his employer"? *Ford, supra*, 444 U.S. at 83. Or, if the delivery barge had been also used as a work platform in a continuous process would not everyone in that vicinity erecting pilings for a bridge be covered?

If anyone who handles "cargo" in the vicinity of water is covered, then the effect of the 1972 Amendments is to merely broaden the "situs" requirement and eliminate the "status" requirement. This would truly be havoc for those employers who never dreamed of the LHCA. Congress intended to apply a "simple, uniform standard of coverage." *Ford, supra*, 444 U.S. at 83. The case below destroys any "simply, uniform, standard" with respect to every non-maritime enterprise along a waterfront though there is no "realistic relationship to the traditional work and duties of a ship's service employment." (*Gilmore, supra*, 528 F.2d at 961) or "a

realistically significant relationship to maritime activities involving navigation and commerce over navigable waters". (*Fusco, supra* (622 F.2d at 1112)

CONCLUSION

In view of the conflict of the decision below with the prior decisions of the Court and with the contemporaneous decisions of the Courts of Appeals for the Second and Ninth Circuits and particularly to resolve authoritatively the status to which the Longshoremen's Act Amendments of 1972 affect those not within a maritime employment, Petitioners respectfully pray that the Court grant a writ of certiorari and reverse the decision of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for a Writ of Certiorari to the United States Supreme Court have been furnished by United States prepaid first class mail on this ____ day of _____ 1981, to the following:

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_____

Attorney

Appendix

A-1

BENNY R. GILLIAM, Petitioner

v.

WILEY N. JACKSON COMPANY,
Fidelity Casualty Company of
New York and Director,
Office of Workers' Compensation
Programs, Respondents.

No. 80-5804.

United States Court of Appeals
Fifth Circuit*
Unit B

October 15, 1981.

Petition was filed seeking review of order of the office of workers' compensation program denying a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act. The Court of Appeals, Charles R. Scott, District Judge, sitting by designation, held that notwithstanding fact that claimant was a construction site foreman, claimant, who was injured while supervising the unloading of a barge at time of his injury, met status requirement under Longshoremen's and Harbor Workers' Compensation Act and was therefore entitled to compensation.

Reversed and remanded.

1. Workers' Compensation — 262

Essential test of employee status under Longshoremen's and Harbor Workers' Compensation Act is that the person seeking compensation was

engaged in maritime employment. Longshoremen's and Harbor Workers' Compensation Act, § 2(3), 33 U.S.C.A. § 902(3).

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452 — October 14, 1980.

2. Workers' Compensation — 262

It is sufficient for purpose of proving status under Longshoremen's and Harbor Workers' Compensation Act that a claimant's activity at time he was injured had a realistically significant relationship to traditional maritime employment. Longshoremen's and Harbor Workers' Compensation Act, § 2(3), 33 U.S.C.A. § 902(3).

3. Workers' Compensation — 262

Notwithstanding fact that claimant was a construction site foreman, claimant, who was injured while supervising the unloading of a barge at time of his injury, met status requirement under Longshoremen's and Harbor Workers' Compensation Act and was therefore entitled to compensation. Longshoremen's and Harbor Workers' Compensation Act, § 2(3), 33 U.S.C.A. § 902(3).

Petition for Review of an Order of Office of Workers' Compensation Programs.

Before FRANK M. JOHNSON, Jr., HATCHETT, Circuit Judges, and SCOTT**, District Judge.

CHARLES R. SCOTT, District Judge:

We are called upon to consider the propriety of the denial of a claim for benefits under the Longshoremen's

and Harbor Workers' Compensation Act (hereinafter "the Act"), 33 U.S.C. § 901 et seq.

**District Judge of the Middle District of Florida, sitting by designation.

Claimant Gilliam was injured while supervising and assisting in the off-loading of pilings from a barge docked in the Amelia River where it passes through Fernandina Beach, Florida. His claim for benefits under the Act was denied by the administrative law judge. The Benefits Review Board (with one judge dissenting) affirmed the denial of benefits, finding that Gilliam was not a covered employee within the terms of the Act. *Gilliam v. Wiley N. Jackson Co.*, 12 BRBS 556 (1980). Specifically, the board determined that Gilliam failed to meet the "status" requirement contained in Section 2(3) of the Act, 33 U.S.C. § 902(3), because he was never "engaged in maritime employment." This conclusion was based upon the board's opinion that Gilliam's work lacked "a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters." We disagree.

The Facts

Gilliam had been employed by the Wiley N. Jackson Company (hereinafter "the Employer") in various capacities for approximately 21 years prior to sustaining his injury. The Employer is a construction company, engaging primarily in the activities of bridge building and road grading. For the last ten years of his employment, Gilliam worked as a construction site

foreman. At the time of his injury, Gilliam's employer was in the process of constructing two parallel highrise bridges over the Amelia River, which is a part of Florida's Intracoastal Waterway, in Fernandina Beach, Florida.

The Employer had contracted with a supplier to have pilings to be used in the bridge construction delivered to the job site via barge. The barge, loaded with pilings, was to journey 110 miles up the Intracoastal Waterway from Daytona Beach, Florida. In anticipation of the barge's arrival, Gilliam, on the day prior to sustaining his injury, supervised and assisted in the building of a dock abutting the shoreline at the construction site. The dock served as a mooring site for the barge and as a secure location for placement of a crane to facilitate off-loading of the pilings from the barge onto the shore.

Shortly prior to his injury, Gilliam was standing on the barge supervising and assisting in the transference of the pilings from the barge to the shore. He had already assisted in hooking the crane cables to several loads of pilings prior to their removal from the barge. Part of his duty was to supervise the order in which the groups of pilings were removed to prevent too much weight from being lifted off of any particular area of the barge, thereby ensuring that the barge remained stable in the water. At the time of his injury, Gilliam was waiting for the crane cables to descend so that he could connect them to another load of pilings. The cables struck Gilliam, knocking him onto the surface of the barge. He suffered serious head and shoulder injuries.

The Law

These facts, as they relate to the issue of Gilliam's status as an employee under the Act, are not in dispute.

Consequently, we are concerned only with whether Gilliam met the status requirement as a matter of law.[1]

---

[1] In addition to the status requirement, a claimant under the Act must meet a "situs" requirement; that is, it is necessary that the claimant's injury occurred on the "navigable waters of the United States" as defined in Section 3(a) of the Act, 33 U.S.C. § 903(a). All parties are in agreement that Gilliam's injury occurred on navigable waters of the United States and, hence, that he met the situs requirement.

Prior to 1972, the navigable waters of the United States included only the area seaward of the so-called **Jensen** line, established in **Southern Pacific Co. v. Jensen**, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917). The **Jensen** line ran along the water's edge, skirting around piers and docks. Thus, for example, in **Nacirema Operating Co. v. Johnson**, 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed.2d 371 (1969), the Supreme Court held that coverage did not extend to longshoremen killed or injured on a pier while attaching cargo to ships' cranes. This was true even though coverage might have inured had the longshoremen been knocked into the water, that is, across the **Jensen** line. See **Northeast Marine Terminal Company, Inc. v. Caputo**, 432 U.S. 249, 259, 97 S.Ct. 2348, 2555, 53 L.Ed.2d 320, 330 (1977). The Court recognized the anomaly of such a result, but concluded it was up to Congress to extend coverage of the Act landward. 396 U.S. at 223-24, 90 S.Ct. at 353-54.

Congress accepted the invitation in 1972, amending the definition of navigable waters to include "...any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel...." 33 U.S.C. § 903(1). At the same time, Congress amended the definition of employee so as to delineate some limitations to the expanded coverage of the Act. 33 U.S.C. § 902(3); see text **infra**.

Respondent Director, Office of Workers' Compensation, United States Department of Labor, filed a brief on behalf of the petitioner herein, arguing that because petitioner was injured on navigable waters it is unnecessary that he meet the Act's status requirement. The Director argues that prior to the 1972 amendments to the Act virtually all persons injured on navigable waters, regardless of their status, were covered. In enacting the 1972 amendments, Congress clearly intended to extend coverage of the Act to certain land-based workers who nevertheless were engaged in maritime employment. In so doing Congress did not, the Director contends, intend to restrict the coverage already afforded by the Act. Thus, the Director argues that Gilliam was protected by the Act, regardless of whether he was engaged in maritime employment, simply because he was injured on navigable waters.

Because we find that Gilliam met the status requirement, see text **infra**, we find it unnecessary to rule upon the Director's argument and decline to do so.

[1] "Employee" is defined in Section 2(3) of the Act, 33 U.S.C. § 902(3), in pertinent part as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoreman, or other person engaged in longshoring operations, and any harbor worker....

Thus, the essential test of employee status under the Act is that the person seeking compensation was "engaged in maritime employment." *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 754 (5th Cir. 1981).

[2] The board rejected petitioner's argument that, because he was performing longshoring activities (i.e., unloading the barge) at the time of his injury, he was engaged in maritime employment.[2] The board was of the opinion that the proper focus was upon the claimant's overall job duties rather than upon the particular activity he was performing at the time of his injury.[3] Gilliam was a construction worker, the board concluded, not a longshoreman. His unloading of the barge was merely incidental to his occupation as a construction worker. As such, the board concluded that Gilliam's

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[2] Petitioner contended in his brief submitted to the Benefits Review Board that his involvement in constructing the dock was the equivalent of harbor work. This is a tenable argument. However, the board's opinion, as well as the transacript of the oral argument before the board, reflect that claimant's counsel expressly abandoned his reliance upon the harbor work claim. Inasmuch as we find that claimant was a covered employee due to his longshoring activities at the time of injury, see text infra, it is unnecessary to consider what impact his work in constructing the dock had upon his status under the Act.

[3] In rejecting a "moment of injury" test, the board relied upon two of its prior decisions, both of which have since been reversed by this Court. **Howard v. Rebel Well Services**, 11 BRBS 568, rev'd, 632 F.2d 1348 (5th Cir. 1980); **Boudloche v. Howard Trucking Co.**, 11 BRBS 689 (1979), rev'd, 632 F.2d 1346 (5th Cir. 1980).

work lacked a "realistically significant relationship to maritime activities involving navigation and commerce over navigable waters."

Contrary to the contention of petitioner, although the cases are not uniform, there is support in the law of this circuit for the board's use of the "realistically significant relationship" test. *Hullinghorst Industries, Inc. v. Carroll, supra*, at 756; *Mississippi Coast Marine v. Bosarge*, 637 F.2d 994, 998 (5th Cir. 1981); *Odom Construction Company, Inc. v. United States Department of Labor*, 622 F.2d 110, 113 (5th Cir. 1980). The recent cases make it clear, however, that the inquiry of whether the claimant's work bore a realistically significant relationship to traditional maritime activity can properly be directed to the particular job the claimant was performing *at the time he was injured,* rather than his overall occupational duties. In other words, it is sufficient for the purpose of proving status under the Act that the claimant's activity at the time he was injured had a realistically significant relationship to traditional maritime employment.

In *Odom Construction Company, Inc. v. United States Department of Labor, supra*, the claimant was a land-based construction worker who was inured while attempting to remove four large concrete blocks from a navigable canal. The blocks, which had been used to moor barges, had slipped into the water due to the erosion of the canal bank. This Court affirmed the award of disability benefits to the claimant, stating:

> On the facts before us, *where the job being done* clearly had "a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters'...," [citing cases] *Maze's work at the time of his injury was maritime.*

622 F.2d at 113 (emphasis added).

Odom was the first decision of this Court to incorporate the "realistically significant relationship test."[4] The language quoted above was technically dicta, however, as the Court in Odom ultimately relied upon the overall circumstances of the claimant's employment to justify the award of benefits.

Arguably, our decision that Maze is a covered employee could be based solely upon the foregoing conclusion that he was engaged in maritime work at the time of his injury. [citing cases] We need not rest on this narrow ground, however, but can look at all the circumstances of Maze's employment.
Id.

The Court concluded that claimant was a covered employee because 20 percent of his work time was spent engaged in maritime employment.

A recent opinion of this Court decided unequivocally the question that the *Odom* panel decided inferentially. In *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750 (5th Cir. 1981), the panel held that a claimant can meet the status test by showing *either* that his occupation as a whole is devoted to maritime employment *or* that he was engaged in maritime employment at the time of his injury. Id. at 754, citing *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 844 (5th Cir. 1978), cert. denied, 442 U.S. 909, 99 S.Ct. 2820, 61 L.Ed.2d 274 (1979).

Thus, in *Hullinghorst*, the claimant was found to have employee status for purposes of the Act even though he was a carpenter by trade. His only connection with maritime employment was his participation in the

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[4] The "realistically significant relationship" test was apparently first employed by the Ninth Circuit Court of Appeals. Weyerhauser Co. v. Gilmore, 528 F.2d 957, 961 (9th Cir. 1975), cert. denied, 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976).

construction of scaffolding beneath a pier extending over the Mississippi River. The sole purpose of the scaffolding was to provide a place for port facility employees to stand while repairing a piece of equipment used in the loading and unloading of ships. Neither the claimant nor his employer participated in any way in the actual repair work on the loading equipment. Yet the claimant's work was nevertheless found to bear a "realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters'...." Id. at 755.

Other decisions, both of this Court and of the United States Supreme Court, make it clear that the definition of employee in Section 2(3) of the Act extends coverage to occupations beyond those specifically enumerated in the statute. *P.C. Pfeiffer Company, Inc. v. Ford*, 444 U.S. 69, 77 n.7, 100 S.Ct. 328, 334, n.7, 62 L.Ed.2d 225, 233 n.7 (1979); *Northeast Marine Terminal Company, Inc. v. Caputo*, 432 U.S. 249, 265 n. 25, 97 S.Ct. 2348, 2358 n. 25, 53 L.Ed.2d 320, 334 n. 25; *Trotti & Thompson v. Crawford*, 631 F.2d 1214 (5th Cir. 1980) (carpenter engaged in constructing a pier was covered employee); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346 (5th Cir. 1980) (truck driver injured while loading small boats into his truck was a covered employee).

[3] Clearly, Gilliam was performing longshoring activities at the time he was injured. The Supreme Court has observed that "longshoreman, or any other person engaged in longshoring operations...." includes any person who performs tasks traditionally performed by longshoremen. *P.C. Pfeiffer Company, Inc. v. Ford, supra*, 444 U.S. at 82, 100 S.Ct. at 337, 62 L.Ed.2d at 236. In defining "traditional" longshoring activities, the Supreme Court, as well as the legislative history of the Act, speak in terms of "unloading a vessel" and

"handling of cargo." *Northeast Marine Terminal Company, Inc. v. Caputo, supra*, 432 U.S. at 267, 97 S.Ct. at 2359, 53 L.Ed.2d at 335.

It can hardly be disputed that the pilings in the case *sub judice* were cargo. They traveled 110 miles over navigable waters to reach their intended destination. Similarly, the barge upon which the pilings traveled was clearly a vessel. It was not simply a work platform used to facilitate construction of the bridges. Gilliam was unloading the pilings from the barge when he was injured. Therefore, Gilliam was unloading cargo from a vessel and, hence, was engaging in longshoring activities at the time he was injured.[5] It is that simple.

The fact that the pilings he was unloading were to be used to build a bridge does not add a different gloss to the situation. As petitioner points out in his brief, only a minute percentage of cargo actually bears a direct relationship to maritime employment. Certainly, had the pilings been off-loaded at a port, destined to be shipped to an inland location for another purpose, no one would contend that they did not constitute maritime cargo.

Because Gilliam was engaged in maritime employment, i.e., longshoring, at the time of his injury, it follows *a fortiori* that his work had a realistically significant relationship to maritime activities involving navigation and commerce. See *Hullinghorst Industries, Inc. v. Carroll, supra*, at 756; *Odom Construction Company, Inc. v. United States Department of Labor, supra*, at 113. As such, Gilliam met the status requirement of Section 2(3), 33 U.S.C. § 902(2) and was

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[5] In reaching our decision, we are guided by the observation of the Supreme Court that the provisions of the Act are broad and should be liberally construed to effect the remedial purpose underlying the Act. **Northeast Marine Terminal Company, Inc. v. Caputo**, 432 U.S. 249, 268, 97 S.Ct. 2348, 2359, 53 L.Ed.2d 320, 335 (1977).

a covered employee within the terms of the Act.[6]

Accordingly, we REVERSE the decision of the Benefits Review Board and REMAND this cause for further proceedings to consider the extent of claimant's injuries and the amount of benefits to which he is entitled.

REVERSED and REMANDED.

[6] Our holding does not stand for the proposition that all persons injured while engaged in bridge building are covered employees. Rather, it is limited to a finding that, under the facts before us, this particular claimant was engaged in maritime employment at the time of his injury and, hence, was an employee within the terms of the Act.

B-1

BRB Nos. 79-388
& 79-388A

DECISION and ORDER

BENNY R. GILLIAM
Claimant-Petitioner

v.

WILEY N. JACKSON COMPANY
and
FIDELITY & CASUALTY COMPANY
OF NEW YORK
Employer/Carrier-
Respondents

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR
Petitioner

Digest
Section
1806

Syllabus

Since passing the situs test alone is insufficient for coverage, and since the moment of injury test is an obsolete evaluator, the Board denied disability benefits to a claimant whose overall duties were not considered maritime employment pursuant to the status test, even though he was injured while on a barge performing longshoring tasks.

Appeal from the Decision and Order of Freeman C. Murray, Administrative Law Judge, U.S. Department of Labor.

Almer W. Beale, II (Toole, Taylor, Moseley & Joyner),

Jacksonville, Florida, for the claimant.
John E. Houser, Jacksonville, Florida, for the employer/carrier.
Mark C. Walters (Carin Ann Clauss, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.
Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.
SMITH, Chief Administrative Appeals Judge:

These are appeals by claimant, Benny R. Gilliam, and the Director, Office of Workers' Compensation Programs, from a Decision and Order (78-LHCA-137) of Administrative Law Judge Freeman C. Murray pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter, the Act). The Board heard oral argument from the parties on December 18, 1979, in Miami, Florida.

Claimant had been employed by the Wiley N. Jackson Company, a bridge and highway construction firm, for approximately 21 years prior to his accident. At the time of the accident and for the prior 10 years, claimant held the position of foreman.

On the day of the injury, claimant was directing a project to construct two parallel bridges across the Amelia River, which is part of the Intracoastal Waterway, near Jacksonville, Florida. Previously, claimant had supervised the construction of a dock adjacent to the bridge site. Its purpose was to aid in unloading and transporting materials for bridge construction.

Shortly before the injury, claimant was supervising the unloading of piling from a barge, which had tran-

sported it from Daytona Beach via the Intracoastal Waterway. The barge was tied up to the dock, and the piling was transferred to the ground. While standing on the barge, claimant attempted to avoid being struck by the lifting cables of a crane, but fell and hit the barge with his head and shoulder. He was subsequently hospitalized and treated for a fracture of the left zygoma and a blowout fracture of the left orbital floor.

The sole issue at the hearing was whether jurisdiction had been established under Sections 2(3) and 3(a) of the Act. 33 U.S.C. §§902(3) and 903(a). The administrative law judge concluded that claimant had met the situs requirement of Section 3(a), but that he had failed to meet the status requirement of Section 2(3). The administrative law judge concluded that claimant was not engaged in longshoring activity and was not a ship repairman, shipbuilder or shipbreaker. Moreover, he applied *Stewart v. Brown & Root, Inc.*, 7 BRBS 356, BRB No. 76-451 (1978), aff'd, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), and *Sedmak v. Perini North River Associates*, 9 BRBS 378, BRB No. 77-896 (1978), and held that claimant was not a harbor worker and was not engaged in maritime employment. The administrative law judge stated that the claimant's involvement in the construction of a dock at the job site was not sufficient to qualify him for coverage, because the dock was only a temporary structure for the purpose of facilitating the bridge building operation, and hence was not intended for maritime commerce or navigation. Therefore, he denied the claim on the ground that claimant had failed to satisfy the status requirement.

Claimant appeals, alleging the (sic) administrative law judge erred in concluding that claimant did not meet the status requirement. [1]

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[1] It is undisputed that claimant was injured over actual navigable waters and therefore satisfied the situs requirement of Section 3(a).

We reject claimant's first contention that injury over navigable waters alone is sufficient to establish coverage under the Act. [2] The Supreme Court has twice expressed its conclusion that the amended Act contains a two-pronged jurisdictional test, which requires proof of both situs and status. *Northeast Marine Terminal Co., Inc. vs. Caputo*, 432 U.S. 249, 264-265 (1977); *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. , 100 S.Ct. 328, 332 (1979).

We also reject claimant's second contention that his longshoring activity at the moment of injury, i.e., supervising the unloading of a barge, is sufficient to meet the status requirement. We have held that a "moment of injury" test is an improper means of determining status under the Act; rather, the employee's overall activities or duties must be examined. *Boudloche v. Howard Trucking Co.*, 11 BRBS 687, 691, BRB No. 78-383 (1979); *Howard v. Rebel Well Service*, 11 BRBS 568, BRB No. 78-502 (1979). Here claimant's overall duties were bridge construction. See Hearing Transcript at 100. His supervision of the unloading of the barge was merely incidental to the bridge building project, rather than to maritime commerce. [3]

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[2] Claimant based his argument in part on the fact that **Fusco v. Perini North River Associates**, 601 F.2d 659, 10 BRBS 625 (2d Cir. 1979), rev'g **Sedmak v. Perini North River Associates**, 9 BRBS 378, BRB No. 77-896 (1978), held that injury over navigable waters was sufficient to establish coverage. However, the Supreme Court vacated **Fusco**, 100 S.Ct. 697 (1980), for reconsideration in light of **Ford, infra**. The Second Circuit then affirmed the Board's decision denying status. F.2d (June 4, 1980), 12 BRBS 328.

[3] For the same reason, we conclude that claimant's supervision of the construction of the dock does not confer status on him. We affirm the administrative law judge's conclusion to this effect. In his brief at page 12, claimant stated this his involvement in the building of the dock was arguably a harbor worker activity. However, at oral argument, claimant's attorney stated that he was not contending that claimant is covered for harbor work. Oral Argument Transcript at 25.

The Board has previously considered the status of a worker engaged in bridge construction. In *Nold v. Guy F. Atkinson Co.*, 9 BRBS 620, BRB Nos. 78-361/A (1979), a case upon which the administrative law judge herein relied, the claimant had been employed as a pile driver in the construction of a bridge over the Napa River. He incurred an injury while stationed on a crane barge located on the river. The Board held that he had been engaged in the construction of a bridge, rather than harbor facilities; therefore, he was not, a "harbor worker" as defined in *Stewart, supra.* Furthermore, the Board ruled that he did not fall within the general category of workers "engaged in maritime employment" who meet the status test. In so holding, the Board applied the *Sedmak* test for status, which requires a determination of whether the work of the injured employee has a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters. The Board concluded that Nold's work did not meet the *Sedmak* test, notwithstanding the fact that he was assisting in the construction of a bridge designed to avoid obstruction of navigation.

In the instant case, for the reasons set forth in *Nold,* we hold that claimant's bridge construction activities do not constitute harbor work or maritime employment within the meaning of Section 2(3). Clearly, this work lacks a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters.

Accordingly, the Decision and Order below is affirmed.

SO ORDERED.

MILLER, Administrative Appeals Judge, dissenting:

I must dissent from my colleagues' decision which

denies benefits to an employee injured in the course of his employment over navigable waters. [1]

My reasons for dissent are fully set forth in *Sedmak, supra,* and it is unnecessary to reiterate them at length. However, even were my colleagues correct and claimant was required to independently establish that he is a maritime employee other than by a showing that his duties required him to render sevices on behalf of his employer on navigable waters, the claimant has established that fact.

Not only has the claimant met the test that my colleagues have enunciated, *i.e.*, "that his duties have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters," but he has met the more restrictive test set forth by the Court of Appeals for the Ninth Circuit in *Weyerhaeuser Co. v. Gilmore,* 3 BRBS 140, 528 F.2d 957 (9th Cir. 1976), that the employee's employment have a realistically significant relationship to the traditional work and duties of a ship's service employment.

At the time of his injury the claimant was on a barge where he was supervising the off-loading of pilings from the barge to a dock. Hearing Transcript, p. 36. Thus he was clearly engaged in longshoring operations, *i.e.*, "maritime employment." That such activity was clearly ship's service employment was recognized by the Supreme Court in *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 96 (1946), when it said: "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew." The Court extended to longshoremen the right to an action for unseaworthiness.

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[1] "Navigable waters" as that term was understood prior to the 1972 amendments to the Act.

The employer has conceded that if the unloading of the pilings had been contracted out to a stevedore, the employees doing the unloading would "probably be covered." Oral Argument Transcript, p. 42.

II

The majority, however, rejects coverage, holding that a "moment of injury" test is an improper means of determining status under the Act, relying on *Boudloche supra,* and *Howard, supra.* For the reasons stated in my dissents in *Boudloche* and *Howard* I must once again disagree with my colleagues' attempt to limit coverage under the Act by the establishment of a "de minimis" rule which bases coverage upon the amount of time spent in covered employment, or, as the majority has stated, "a substantial portion of an emloyee's duties should be maritime in order for him to meet the status test." *Boudloche,* 11 BRBS at 691.

The statute makes it clear that, to bring an employer within the scope of the Act, it need have only one employee "employed in maritime employment, *in whole or in part upon the navigable waters of the United States.*" LHWCA Section 2(4), 33 U.S.C.A. §902(4) (Emphasis added).

What the majority is attempting to do in its "substantial portion of duties" test is to modify the statutory language which recognized that an employee may be engaged in maritime employment "in part." If Congress had wanted to limit coverage under the Act only to those who are engaged in maritime employment for a substantial part of the time, then Congress could have amended Section 2(4) to accomplish that purpose.

Nevertheless, even if we were to assume that the statutory language is ambiguous and doubt has been created as to congressional intent, then that doubt must be resolved in favor of the claimant.

The United States Court of Appeals for the Fifth Circuit has held that "[t]he judicial policy has long been to resolve all doubts in favor of the employee and his family and to construe the Act in favor of the employee for whose benefit it is primarily intended." *Army Air Force Exchange v. Greenwood,* 9 BRBS 394, 396-397, 585 F.2D 791, 794 (5th Cir. 1978), and that the policy of the Act has been "to resolve doubtful questions of coverage in the claimant's favor." *Tampa Ship Repair v. Director,* 4 BRBS 243, 244, 535 F.2d 936, 938 (5th Cir. 1976)

IV.

However, even if it were necessary to look further than claimant's maritime activity at the time of injury, claimant's overall activities when properly viewed bring him within the Act's coverage. He was engaged in a project which consisted of tearing down an old drawbridge and building two parallel bridges to replace it. [2] Hearing Transcript, p. 34. The demolition or construction of bridges, necessitating work on navigable waters, has always been considered maritime.

In *Davis v. Department of Labor and Industries,* 317 U.S. 249 (1942), the Supreme Court wrestled with the question of whether an employee who drowned *while dismantling a drawbridge* could properly be covered by the state compensation law which included within its coverage "all employers and workmen ... *engaged in maritime occupations* for whom no obligation exists under the maritime laws." 317 U.S. at 252 (Emphasis added). The State of Washington had found that "the work which the claimant was doing at the time of the said fatal accident does not come under the jurisdiction

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2 I believe it would be proper to infer that this project would be an aid to navigation and commerce on navigable waters since a ship on navigable waters must be delayed while a drawbridge is raised so that it may pass.

of the workmen's compensation act, but is *maritime in character.*" 317 U.S. at 263, fn. 2 (Emphasis added). The Surpeme Court reversed, holding that the case fell within a twilight zone where "employees must have their rights determined case by case." 317 U.S. at 256. The Fifth Circuit subsequently analyzed jurisdiction in the "twilight zone" explicated in *Davis* and stated: "[W]hen the case is on the borderline the worker is entitled to seek relief under either his state law or the [Act]." *Holland v. Harrison Brothers Dry Dock and Repair Yard, Inc.*, 306 F.2d 369, 372 (5th Cir. 1962).

In *Peter v. Arrien*, 325 F.Supp. 1361 (E.D. Pa. 1971), a case decided prior to the 1972 amendments, the deputy commissioner, who was the adjudicating officer at that time, denied benefits on the basis that the employee was not engaged in maritime employment at the time of his death because the destruction and demolition of bridges over navigable waters of the United States traditionally comes under the jurisdiction of state compensation laws. The district court reversed, holding that:

> Injuries to employees engaged in the construction or demolition of bridges are compensable under the Longshoremen's Act. In *Davis v. Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L. Ed. 246 (1942), claimant, the widow of a construction worker who drowned while engaged in the dismantling of a drawbridge across a navigable river, sought compensation under the State of Washington's Compensation Act. The Court, while sustaining the applicability of the state act, found that claimant could also have recovered under the Longshoremen's Act. The right of one engaged in the construction of a bridge to recover

> compensation under the Longshoremen's Act was again sustained in *Dixon v. Oosting*, 238 F.Supp. 25 (E.D. Va. 1965) and *Hardaway Contracting Company v. O'Keeffe*, 414 F.2d 657 (5th Cir. 1968).

325 F.Supp. at 1365. The Court of Appeals for the Third Circuit affirmed, 463 F.2d 252 (3d Cir. 1972), relying on the district court's opinion.

In *Hardaway, supra,* the employee was a laborer on a bridge-building project. However, the issue before the court was not whether this employee who drowned when he fell from a vessel was a maritime employee, a fact not in dispute, but whether this maritime employee was a member of the crew of a vessel, as argued by the employer, and thereby excluded from the Act's coverage. The district court affirmed an award of benefits under the Act. The court of appeals, in considering the issue, cited its decision in *Offshore Co. v Robison*, 266 F.2d 769 (5th Cir. 1959), as to the board coverage extended to "seamen" under the Jones Act, 46 U.S.C. §688. The court then said:

> Nevertheless, there were situations in which persons working on, at, or near structures capable of floating on navigable waters were still not covered, and Congress enacted the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq. covering all maritime workers except masters or "members of a crew of a vessel."* (Emphasis added).

414 F.2d at 659. The Fifth Circuit recognized that this maritime employee, working as a laborer on a bridge-building project, was covered under the Act and not excluded therefrom as a member of the crew of a vessel.

V.

However, in my view, the majority has misdirected its focus towards the nature of the project in which the vessel was engaged, rather than on the nature of claimant's employment in relationship to a vessel or navigable waters.

Offshore Co. v. Robison, supra, has established the criteria for determination of whether one is a member of a crew and within the purview of the Jones Act coverage, 46 U.S.C. §688, and thus excluded from coverage under the Act. In setting up these requirements, the Fifth Circuit relied on several decisions cited by the Supreme Court in *Gianfala v. Texas Co.*, 350 U.S. 879 (1955), which had overruled that circuit's finding that Gianfala was, as a matter of law, not aboard ship to aid in navigation, but was there as a member of a drilling crew doing work done only by oil field workers. The Supreme Court did not discuss the law but cited *South Chicago Coal & Dock v. Bassett*, 309 U.S. 251 (1940), *Summerlin v. Massman Construction Co.*, 199 F.2d 715 (4th Cir. 1952), *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.2d 383 (6th Cir. 1953), and *Gahagan Construction Corp. v. Armad*, 165 F.2d 301, 305 (1st Cir. 1940). 350 U.S. at 879.

The Fifth Circuit, in reviewing each of these cases, found:

> There are common denominators in Gianfala, Bassett, Summerlin, Wilkes, and Gahagan decisions. (1) The claimants are not ordinarily thought of as "seamen" aboard "primarily in aid of navigation," although they may serve the vessel in the sense that the work they perform fits in with the function the vessel serves. Gianfala was a member of a drilling crew on a submersible barge, Summerlin a fireman on a

> derrick [used in connection with pouring concrete into certain forms incident to *building a bridge* across the river], Wilkes a common laborer on a dredge [whose only duty was to level off gravel pumped up from the river bottom and dumped on the barge where he was working], Gahagan a deckhand on a dredge [being used to pump silt and sand from the dredge to the shore, depositing it as fill on embankments *for an airport*].

266 F.2d at 776. In no case did the court discuss the nature of the project in which the employee was engaged to determine whether he was a member of a crew, the focus being solely on the relationship between the employee and the vessel on navigable waters.

Recently, in *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342 (5th Cir. 1980), the Fifth Circuit was again faced with the question as to whether a drilling platform employee (a roughneck) injured on a tender on the outer continental shelf was a seaman. The court found that he was not a member of the crew, relying on *Robison, supra.* However, it did find he could maintain a negligence action against the employer under Section 905(b) of the Act, 33 U.S.C.A. §905(b), holding that the 1972 amendments applied to employees on the outer continental shelf. The court said:

> *We are aware that remedial legislation, particularly in the field of workmen's compensation, must be constructed broadly and liberally so as to effectuate fully the legislature's remedial purpose.* (Citations omitted).
>
> . . .
>
> The contrary result would only inject a further anomaly into an area of law already fraught with "fine and often intuitively questionable

> distinctions." For example, were we to accept Sea Drilling's argument that Section 905(b) does not apply to workers like Longmire who trace their rights under the LHWCA through the OCSLA, we would preserve on the Outer Continental Shelf precisely the problem Congress sought to eliminate by the 1972 amendments.... If Longmire is not entitled to benefits of the negligence action provided in Section 905(b), then he is also not subject to the abolition of the unseaworthiness remedy contained in that section. (Footnote omitted) (emphasis added).

610 F.2d at 1351-1353.

The same reasoning applies to the case at bar. The claimant, injured aboard a vessel during unloading operations, a function formerly performed by members of a crew, would be entitled to a claim against his employer for the unseaworthiness of the vessel, an anomalous result in view of the intent of Congress to eliminate such remedies.

VI.

Finally, I believe it is necessary to consider the Supreme Court's most recent decision concerning jurisdiction under the Act, *Sun Ship Inc. v. Commonwealth of Pennsylvania*, 48 U.S.L.W. 4826 (June 23, 1980).

The issue in *Sun Ship* was whether a state could apply its workers' compensation law to land based injuries that fall within coverage of the Act. Referring to the original Act, the court stated:

> Federal and state law were thus linked together to provide theoretically complete coverage for maritime laborers. But the boundary at which state remedies gave way to federal remedies was far from obvious in individual cases. As a result,

the injured worker was compelled to make a jurisdictional guess before filing a claim; the price or error was unnecessary expense and possible foreclosure from the proper forum by statute of limitations. *Davis v. Department of Labor*, 317 U.S. 249, 254 (1942). After a decade and a half during which there had not been formulated "any guiding, definite rule to determine the extent of state power in advance of litigation," *id.*, at 253, the Court determined that the border between federal and state compensation schemes was less a line than a "twilight zone," in which "employees must have their rights determined case by case...," *id.*, at 256. Within this zone, *Davis* effectively established a regime of concurrent jurisdiction.

Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962), further overlapped federal and state law coverage for marine workers. *Calbeck* held that the LHWCA comprehended "all injuries sustained by employees on navigable waters," *id.*, at 124, without regard to whether the locus of an event was "maritime but local," and hence within the scope of state compensation provisions.

. . .

Before 1972, then, marine-related injuries fell within one of three jurisdictional spheres as they moved landward. At the furtheast extreme. *Jensen* commanded that nonlocal maritime injuries fall under the LHWCA. "Maritime but local" injuries "upon the navigable waters of the United States," 33 U.S.C. §903(a), could be compensated under the LHWCA or under state

law. And injuries suffered beyond navigable waters — albeit within the range of federal admiralty jurisdiction — were remediable only under state law. *Nacirema Co. v. Johnson, supra.*

In 1972, Congress superseded *Nacirema Co. v. Johnson* by extending the LHWCA landward beyond the shoreline of the navigable waters of the United States. Pub. L. No. 92-576, 86 Stat. 1251, amending 33 U.S.C §903(a). In so doing, the Longshoremen's Act became, for the first time, a source of relief for injuries which had always been viewed as the province of state compensation law.

Absent any contradicting signal from Congress, the principles of *Davis v. Department of Labor, supra,* and of *Calbeck v. Travelers Insurance Co., supra*, direct the conclusion that the 1972 extension of federal jurisdiction supplements, rather than supplants, state compensation law. *Given that the pre-1972 Longshoremen's Act ran concurrently with state remedies in the "maritime but local" zone, it follows that the post-1972 expansion of the Act landward would be concurrent as well....* Furthermore, the "jurisdicitional dilemma," *Davis, supra,* at 255, that results when employees must claim relief under one of two exclusive compensation schemes is as acute when the jurisidictional boundary between schemes is fixed upon land, as it is when the line is drawn between two maritime spheres. *To read the 1972 amendments as compelling laborers to seek relief under two*

> *mutually exclusive remedial systems would lead to the prejudicial consequences which we described in Davis as*
>
> "defeat[ing] the purpose of the federal act, which seeks to give 'to these hardworking men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation,' and the state Acts... which aim() at 'sure and certain relief for workmen.' " *Id.*, at 254; *see Calbeck, supra*, at 126.

48 U.S.L.W. at 4827-28 (Emphasis added).

It is clear from the Court's language that it considers there to be concurrent jurisdiction for land based injuries, as well as for water based injuries, and that it will not permit the re-establishment of the jurisictional dilemma that employees faced prior to *Davis*. The majority would re-establish that jurisictional dilemma by limiting coverage only to those who are engaged in maritime employment during a substantial part of their activities, or only to those projects which they deem to be maritime commerce, despite the fact that such commerce is conducted upon the navigable waters. I dissent.

Dated this 13th day
of August 1980

C-1

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
WASHINGTON, D.C. 20036

In the Matter of

BENNY R. GILLIAM

Claimant

v.

WILEY N. JACKSON COMPANY

Employer

and

FIDELITY AND CASUALTY COMPANY
OF NEW YORK

Carrier

Case No. 78-LHCA-137

OWCP No. 6-32505

Almer W. Beale, II, Esquire
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For the Claimant

John E. Houser, Esquire
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Jacksonville, Florida 32202

For the Employer
and Carrier

BEFORE:
FREEMAN C. MURRAY
Administrative Law Judge

DECISION AND ORDER

Jurisdiction and Procedural History

This is a claim for compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (the Act), 33 U.S.C. 901 et seq.

The deposition of Benny R. Gilliam, taken April 29, 1977, is marked as Claimant No. 2; the deposition of Mary Jean Gilliam, taken November 9, 1977, is marked as Claimant No. 3; the Baptist Memorial Hospital medical record of Benny R. Gilliam showing an admission date of September 26, 1977, is marked as Claimant No. 4; the St. Vincent's Medical Center medical record of Benny R. Gilliam showing an admission date of January 4, 1977, is marked as Claimant No. 5; the deposition of Dr. Jacob Green, taken November 7, 1977, is marked as Respondents No. 1; and the deposition of Dr. Calvin Hudson, taken June 27, 1978, is marked as Respondents No. 2. The exhibits are admitted into evidence.

Stipulations

It is stipulated and agreed by and between the

parties that at all times pertinent to this case that (Tr. 8):

1. Claimant and Employer were in an employee-employer relationship.
2. An event occurred on January 4, 1977, resulting in physical damage to the Claimant.
3. The Employer had timely notice of the injury.
4. The Claimant filed a timely claim for compensation under the Act.
5. The Employer filed a notice of controversion dated April 6, 1977.
6. The Claimant has been paid compensation under the Florida State Compensation Act.
7. The Claimant has not returned to his regular employment, but it is agreed that he worked for a two-week period in April 1977.

Findings of Fact and Conclusions of Law

Based upon the entire record in this case, and my observation of the witnesses and their demeanor, I make the following Findings of Fact and Conclusions of Law.

The stipulations agreed to by the parties are consistent with the evidence, and I find them to be established as facts.

Issue No. 1 — Jurisdiction:

On January 4, 1977, Claimant was a foreman for Employer, and was directing a project to construct two parallel bridges across the Amelia River, which is a part of the Intracoastal Waterway. In order to unload and transport materials to construct the bridges, a dock had been built adjacent to the bridge site. On the day of the injury Claimant was supervising the unloading of piling from a barge to the ground so that the piling could be reloaded onto another barge for delivery to the job site;

the primary supervisory task was to direct the unloading of the barge in such a way that the barge would not tip. (Tr. 34-37) Mr. Gilliam was standing on the barge when he attempted to avoid being struck by the lifting cables of the crane, and fell, striking the barge with his head and shoulder. (Tr. 37-39, 49) He was hospitalized from January 4 to January 8, 1977, when he was treated for a fracture of the left zygoma and a blowout fracture of the left orbital floor.

Quality briefs with supplements have been submitted, that last of which was received by me on or about April 5, 1979.

Section 2(3) of the Act defines an "employee" as any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net. 33 U.S.C. §902(3) This requirement is generally referred to as the "status" test.

Section 3(a) of the Act provides that compensation shall be paid for disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States, including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel. 33 U.S.C. §903(a). This is generally referred to as the "situs" test.

As the Supreme Court noted in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977):

> [t]he 1972 amendments thus changed what had been essentially only a "situs" test of eligibility

> for compensation to one looking to both the "situs" of the injury and the "status" of the injured.

It is clear from the evidence of record that the Claimant was injured over navigable waters of the United States, and thus the "situs" test is satisfied.

With respect to "status", however, the conclusion is more difficult. Clearly Mr. Gilliam was not engaged in longshoring nor was he a ship repairman, shipbuilder, or shipbreaker. If he is to qualify as an employee under the Act it must be as a harbor worker. That category has been more particularly defined in *Stewart v. Brown & Root, Inc.*, 7 BRBS 356, BRB No. 76-451 (January 12, 1978), where it was proposed:

> For future application of the "status" test, at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships) will be deemed "harbor workers" within the meaning of Section 2(3) of the Act.

The Benefits Review Board has also held with regard to "status" in *Sedmak v. Perini North River Associates*, 9 BRBS 378, BRB No. 77-896 *et al.* (November 30, 1978):

> ...a claimant's employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3).

Based on my review of the evidence and the pertinent law, I find and conclude that Mr. Gilliam was not engaged in maritime employment under the Act in that he did not satisfy the necessary "status" requirements.

Consequently, his claim for compensation benefits under the Act must be denied.

Nold v. Guy F. Atkinson Company, 9 BRBS 620, BRB No. 78-361 (January 24, 1979) is a closely analagous case where Claimant was employed as a pile driver in the construction of a bridge over the Napa River to connect two highways. Federal specifications required the 2,230 span to have a mid-channel clearance of 70 feet for passage of river traffic. The Claimant was injured while on the crane barge located in the river. The Benefits Review Board held that the Claimant was involved in the construction of a bridge over a river, not in the construction of harbor facilities, was not a "harbor worker" as defined in *Stewart, supra*, and that his work in constructing a bridge did not have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters, even though the bridge was designed to avoid obstruction of navigation.

I have not overlooked the fact that Claimant was involved in the construction of a dock at the job site. Claimant described it as five pilings driven out in the river with ballast and dirt fill to make a loading and unloading ramp so concrete piling and beams could be transported to the job site. (Tr. 34, 35) Obviously, this dock was constructed for facilitating the bridge building operation, was likely temporary in nature, and was not designed or intended for maritime commerce or navigation.

Having concluded that the parties were not subject to the jurisdiction of the Act, the issue of disability need not be considered.

Order

It is ordered that the claim by Benny R. Gilliam for

compensation benefits under the Act be, and it hereby is DENIED.

FREEMAN C. MURRAY
Administrative Law Judge

Dated: May 24, 1979.
Washington, D.C.

Opposition

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FILED
JAN 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1039

In the Supreme Court of the United States

OCTOBER TERM, 1981

WILEY N. JACKSON COMPANY AND FIDELITY AND CASUALTY COMPANY OF NEW YORK, PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND BENNY R. GILLIAM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Whether a bridge construction worker injured on a barge while supervising the unloading of pilings onto shore is engaged in "maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 659 F. 2d 54. The opinion of the Benefits Review Board (Pet. App. B1-B16) is reported at 12 B.R.B.S. 556. The decision and order of the administrative law judge (Pet. App. C1-C7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1981. The petition for a writ of certiorari was filed on December 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent Benny R. Gilliam, an employee of petitioner Wiley N. Jackson Company, was injured on a barge while

unloading pilings to be used in a bridge construction project (Pet. App. A3). Petitioner is a construction company engaged primarily in bridge and road grading. At the time of Gilliam's injury, petitioner was in the process of constructing two parallel highrise bridges over the Amelia River, which is part of Florida's Intracoastal Waterway (*id.* at A3-A4). The day before his injury, Gilliam had supervised and assisted in building a dock adjacent to the river's edge at the construction site. The dock would serve as a mooring site for supply barges delivering pilings to be used in the bridge construction, and would also allow placement of a crane to facilitate the unloading of the pilings onto shore. On the day of injury, Gilliam was standing on the barge supervising and assisting in the unloading of the pilings. Gilliam attached crane cables to loads of pilings on the barge and ensured that the barge remained stable in the water as the pilings were lifted from the barge. He was injured when he jumped to avoid being struck by the crane cables as they descended for another load, falling against the barge and sustaining serious head and shoulder injuries (*id.* at A4, B2-B3, C3-C4).

Gilliam filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. III) 901 *et seq.* The administrative law judge (ALJ) denied Gilliam's claim, holding that he met the "situs" test of Section 3(a) of the Act, 33 U.S.C. 903(a), but not the "status" test of Section 2(3) of the Act, 33 U.S.C. 902(3). Specifically, the ALJ held that Gilliam was not engaged in "maritime employment" because he "was not engaged in longshoring nor was he a ship repairman, shipbuilder, or shipbreaker. If he is to qualify as an employee under the Act it must be as a harbor worker"

(Pet. App. C5). The ALJ concluded that Gilliam was not a harbor worker because working on a bridge construction project was not deemed to have a realistically significant relationship to navigation and commerce (*id.* at C5-C6).[1]

Gilliam and the Director, Office of Workers' Compensation Programs, appealed to the Benefits Review Board pursuant to Section 21(b)(3) of the LHWCA, 33 U.S.C. 921(b)(3). The Board affirmed the decision that Gilliam was not engaged in "maritime employment," although it seemed to concede that Gilliam was so engaged at the moment of injury. Specifically, it rejected the contention that Gilliam's "*longshoring activity* at the moment of injury, i.e., supervising the unloading of a barge, is sufficient to meet the status requirement" (Pet. App. B4; emphasis added). The Board held that Gilliam's overall duties in bridge construction did not constitute "maritime employment," on the ground that it did not have a "realistically significant relationship to maritime activities" (*id.* at B4-B5).[2]

Gilliam sought review of the Board's decision in the court of appeals pursuant to Section 21(c) of the Act, 33 U.S.C. 921(c). The Director participated as a respondent and filed a brief in support of Gilliam's petition for review. The court granted the petition and held that Gilliam was covered by the Act by virtue of his maritime duties at the time of injury.

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[1]The ALJ also held that Gilliam's construction of the dock the day before his injury did not make him a harbor worker because "this dock was constructed for facilitating the bridge building operation, was likely temporary in nature, and was not designed or intended for maritime commerce or navigation" (Pet. App. C6).

[2]Board Member Miller dissented, relying on his view that regular duties on navigable waters constitute maritime employment. Moreover, he believed that even if a "significant relationship to * * * navigation and commerce" test is required, Gilliam met the test both because of his longshoring duties at the moment of injury and because of his overall duties in bridge construction (Pet. App. B5-B16).

It held that the proper test for determining "maritime employment" is whether the claimant's work "bore a realistically significant relationship to traditional maritime activity" and that the test "can properly be directed to the particular job the claimant was performing *at the time he was injured*" (Pet. App. A7; emphasis in original). The court concluded that "[c]learly, Gilliam was performing longshoring activities at the time he was injured" (*id.* at A9). Section 2(3) extends coverage to any "longshoreman or other person engaged in longshoring operations" (33 U.S.C. 902(3)), and the court noted (Pet. App. A9-A10) that this Court has held that the statutory language includes any person who performs tasks traditionally performed by longshoremen (*P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 82 (1979)), including persons "unloading a vessel" and "handling cargo" (*Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 267 (1977)). The court below reasoned (Pet. App. A10) that

> [i]t can hardly be disputed that the pilings in the case *sub judice* were cargo. They traveled 110 miles over navigable waters to reach their intended destination. Similarly, the barge upon which the pilings traveled was clearly a vessel. * * * Therefore, Gilliam was unloading cargo from a vessel and, hence, was engaging in longshoring activities at the time he was injured.[3]

DISCUSSION

The holding below that a bridge construction worker performing longshoring duties at the time of injury is

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[3]The court did not find it significant that the pilings were to be used in bridge construction because "only a minute percentage of cargo actually bears a direct relationship to maritime employment. Certainly, had the pilings been off-loaded at a port, destined to be shipped to an inland location for another purpose, no one would contend that they did not constitute maritime cargo" (Pet. App. A10).

engaged in "maritime employment" is correct both for the reason given by the court of appeals and on broader grounds not addressed below. But the ruling appears to conflict with the denial of coverage in similar cases in the Second Circuit, as we noted (at pages 15-16) in the Director's pending petition for certiorari in *Director, OWCP* v. *Perini North River Associates*, petition for cert. pending, No. 81-897 (filed Nov. 12, 1981).[4] Because of this conflict, we suggest that the Court hold the petition in this case pending either the denial of a writ of certiorari or a decision on the merits in the *Perini* case.

1. Respondent Gilliam is covered under the Act for the reason expressed by the court below: he was performing longshoring duties at the moment of injury. Section 2(3) describes a covered employee as "any person engaged in maritime employment, including any longshoreman or *other person engaged in longshoring operations* * * *" (33 U.S.C. 902(3); emphasis added). On the day of his injury, as part of his regular duties, Gilliam was engaged in the traditional longshoring operation of unloading cargo from a vessel, thus falling squarely within the scope of the Act.

The court of appeals correctly ruled (Pet. App. A10) that it was irrelevant, for coverage purposes, that the cargo Gilliam was unloading consisted of pilings to be used in bridge building. The ultimate use of cargo is never relevant in determining whether one is engaged in longshoring. The only important factor is that Gilliam was engaged in the traditional longshoring job of transferring cargo from a vessel at port onto shore.

The court of appeals also properly rejected petitioner's argument against the "moment of injury" test. This Court

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[4]We are serving petitioner and respondent Gilliam with a copy of the Director's petition for a writ of certiorari in *Perini*.

has held that, under the 1972 amendments to the LHWCA, Congress "counted as 'longshoremen' persons who spent 'at least some of their time in indisputably longshoring operations.' " *P.C. Pfeiffer Co.* v. *Ford, supra*, 444 U.S. at 75, quoting *Northeast Marine Terminal Co.* v. *Caputo, supra*, 432 U.S. at 273. See *Boudloche* v. *Howard Trucking Co.*, 632 F. 2d 1346 (5th Cir. 1980), cert. denied, No. 80-1563 (June 8, 1981); *Howard* v. *Rebel Well Service*, 632 F. 2d 1348 (5th Cir. 1980). Moreover, this Court held long ago, before the extension of the Act's coverage in the 1972 amendments, that a person's maritime activity at the time of injury establishes coverage, even where a claimant was normally engaged in nonmaritime duties. *Parker* v. *Motor Boat Sales, Inc.*, 314 U.S. 244, 247 (1941).

The petitioner in this case accepted delivery of pilings from a supplier by barge and assigned Gilliam first to help build a dock as a mooring and unloading site and then to supervise the unloading of the cargo. This assignment required Gilliam to work upon actual navigable waters and necessitated the exercise of substantial caution to keep the barge stable in the water. Petitioner thus exposed Gilliam to the traditional hazards of longshoring work that the LHWCA was designed to cover. The court below correctly concluded that Gilliam's injury fell within the purview of the Act.

2. Although the ruling below is correct, it appears to conflict with decisions of the Second Circuit that deny coverage to maritime construction workers whose duties include the unloading of cargo from supply vessels.

In *Fusco* v. *Perini North River Associates (Fusco II)*, 622 F. 2d 1111, 1112-1113 (1980), cert. denied, 449 U.S. 1131 (1981), the Second Circuit denied coverage to two workers engaged in constructing a sewage treatment plant on navigable waters, reversing its earlier ruling (*Fusco* v. *Perini North River Associates (Fusco I)*, 601 F. 2d 659, 669

(1979)) that they were engaged in maritime employment because their principal duties were performed on actual navigable waters. In *Fusco II*, the court reasoned that the claimants' work in constructing a sewage treatment plant "had nothing significant to do with navigation or with commerce on navigable waters" (622 F. 2d at 1113). The court specifically rejected one of the claimant's arguments that he was covered because his job included longshoring activities. The court reasoned that the claimant's

> duties were exclusively in connection with the construction of a sewage disposal plant. When [the claimant] unloaded a barge used in carrying construction materials from the shore to the point of construction, he was not performing operations which longshoremen perform. Longshoremen do not unload barges used in connection with construction of a structure which reaches from a point on shore to a point in the river.

Ibid.

In *Churchill* v. *Perini North River Associates*, 652 F. 2d 255 (1981), petition for cert. pending *sub nom. Director, OWCP* v. *Perini North River Associates*, No. 81-897 (filed Nov. 12, 1981), the Second Circuit relied on its ruling in *Fusco II* to deny coverage to a worker on the same sewage treatment plant project, even though that worker was injured while he was on a barge in actual navigable waters. In addition to arguing that Churchill was covered because he would have been covered even before the 1972 amendments extended coverage under the LHWCA, the Director also argued that Churchill was covered because his duties at the time of injury included the unloading of caissons and other material from supply barges. See 81-897 Pet. 16 n.11. The Second Circuit, however, did not even address the longshoring argument in denying coverage to the maritime construction worker.

3. Gilliam is covered by the Act for another reason, not addressed below, but rejected by the Second Circuit. The broader basis for coverage is the subject of the pending petition in *Director, OWCP* v. *Perini North River Associates, supra.*

Gilliam is a bridge builder whose regular duties require him to work on, over, and about the water, and he was in fact injured while on actual navigable waters. Thus, Gilliam clearly would have been covered before the 1972 amendments. See *Hardaway Contracting Co.* v. *O'Keeffe*, 414 F. 2d 657 (5th Cir. 1968).[5] As fully discussed in the Director's *Perini* petition, Congress in 1972 moved the coverage of the Act shoreward to include workers engaged in maritime employment injured on the new, broadly defined "navigable waters" adjacent to the water's edge. 33 U.S.C. 903(a). The indisputable congressional purpose behind the 1972 amendments was to expend coverage "to protect *additional* workers." S. Rep. No. 92-1125, 92d Cong., 2d Sess. 1 (1972) (emphasis added). The definition of covered employees under amended Section 2(3) "does not exclude other employees traditionally covered * * *." S. Rep. No. 92-1125, *supra*, at 16. Thus, a marine construction worker injured on actual navigable waters, like Gilliam, who would have been covered before the 1972 amendments, remains covered now as an employee "engaged in maritime employment." See *Holcomb* v. *Robert W. Kirk & Associates, Inc.*,

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[5]Thus, this case, like the *Perini* case in which a petition for a writ of certiorari has been filed, presents the issue under the amended Act that this Court left unresolved in *Northeast Marine Terminal Co.* v. *Caputo, supra*, 432 U.S. at 265 n.25: "whether Congress excluded people who would have been covered before the 1972 Amendments; that is, workers who are injured on navigable waters as previously defined."

655 F. 2d 589, 592-593 (5th Cir. 1981), petition for cert. pending, No. 81-1109 (filed Dec. 4, 1981).[6] If this Court should grant the petition in *Perini* and hold that marine construction workers injured on actual navigable waters remain covered under the amended Act, Gilliam would also be covered on this broader ground not reached below.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of the petition and, if certiorari is granted, a ruling on the merits in *Director, OWCP* v. *Perini North River Associates*, No. 81-897.

Respectfully submitted.

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JANUARY 1982

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[6] But see *Boudreaux* v. *American Workover, Inc.*, 664 F. 2d 463 (5th Cir. 1981), holding that an oilfield specialty worker injured while performing his duties on a movable oil drilling barge on navigable waters was engaged in "maritime employment" and hence satisfied the "status" test of the LHWCA. Although the panel remarked that "a persuasive argument could be made that any worker who would have been covered under the pre-1972 LHWCA is still covered under the post-1972 LHWCA" (*id.* at 467), it "refuse[d] to consider the mere fact of injury while working on water sufficient for coverage" (*ibid.*).

Petitioner's Reply Brief

Office - Supreme Court, U
FILED
MAR 17 1982
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NO. 81-1039

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

WILEY N. JACKSON COMPANY
AND
FIDELITY AND CASUALTY COMPANY
OF NEW YORK

Petitioners,

vs.

DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS
U.S. DEPARTMENT OF LABOR &
BENNY R. GILLIAM,

Respondents.

Petition for Writ of Certiorari
to the United States Court of
Appeals for the Eleventh Circuit

Petitioners' Reply Brief

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This case and *Director, OWCP v. Perini North River Associates,* No. 81-897, cert. granted Feb. 22, 1982, ["Churchill"] may appear to be similar but, in reality, they are quite different. *Churchill* is narrow in scope as it is contained by its facts. *Gilliam* is broad and expansive.

The "longshoring operations" suggested in *Churchill* are of an intramural sort — the handling of items by barge and crane within a construction project. In *Gilliam* the handling of cargo was through a material supplier-imposed requirement. That supplier chose a waterborne means of transportation entirely for its own benefit. The trial record below affirmatively shows the unloading operations as done by Gilliam were not of a longshoreman's calling. Nevertheless the Eleventh Circuit has called it a "longshoring operation" within the meaning of 33 USC §902(3). This conclusion is based on no more than a similiarity of physical activity.

The distance of travel can not be material. If the supplier's plant were fortuituously on an adjacent lot the character of the transaction would be no different. Should that supplier's choices or costs be sufficient to impose burdens upon a purchaser? Is the purchaser to be compelled to charge more for the ultimate product so that he might dictate the means of delivery of his supplies?

"Upon the navigable waters" is also different in the two cases. *Churchill* is of a local concern, though in a major sea-traffic area. *Gilliam,* however, is totally different. Imagine a highway wending its way from the Atlantic to the Pacific Coast. Local contractors strewn along that route do portions of the work. A host of "navigable" waterways are crossed. Do each of those crossings give need for longshore coverage — longshore coverage to persons who have never heard of the

Act, have no idea what a "navigable" waterway is and know of maritime commerce only through the local cinema? Do each of those groups of employees, with their employers, engage in struggles to determine at what point the maritime commerce came to "rest" or met the "interface" between maritime and land transportion?

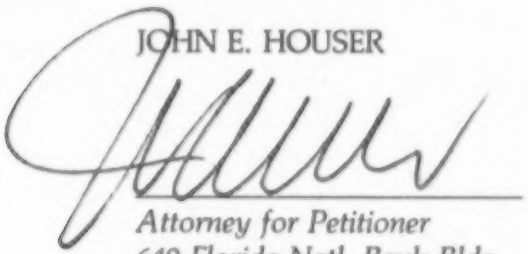
The Congress was seeking some sort of simplicity, some sort of rationale, some sort of coherence. The position of the Director is to encourage confusion and casuistries. The Director's suggestion that *Gilliam* be "put on the shelf" is merely an effort to save for another day a battle, on a large scope, which will bring an answer desired by labor and by industry. While the interest of the Director may be served by perpetuation of this struggle, we urge that the remaining parties would be severely penalized.

The Director suggests that all those covered before the 1972 Amendments are still covered. The Director cites *Hardaway Constracting Co. v. O'Keeffe*, 414 F.2d 657 (5 Cir. 1968) as proof that workers such as Gilliam were covered before the 1972 Amendments to the LHWCA — and Congress did not intend to withdraw that coverage.

The Congress' concern of bridge workers is akin to the Roman Army's concern with germs. A review of the transcript of testimony before the House Labor Committee, committee reports and of the Congressional Record shows that no mention was ever made of these miscellaneous workers who fortuitously found themselves injured upon navigable waters. The entire thrust of the hearings before the Congress was of longshoremen, shipyard workers and harbor workers — those entwined in maritime commerce. It was their representatives who spoke.

We urge that certiorari be granted and bring order out of this chaos. It is urged that this Court give to the affected persons the substantial direction which is so ferverently sought.

Respectfully submitted,



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I HEREBY CERTIFY that three copies of the foregoing Petitioners' Reply Brief have been furnished by United States prepaid first class mail on this 4 day of March 1982, to the following:

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